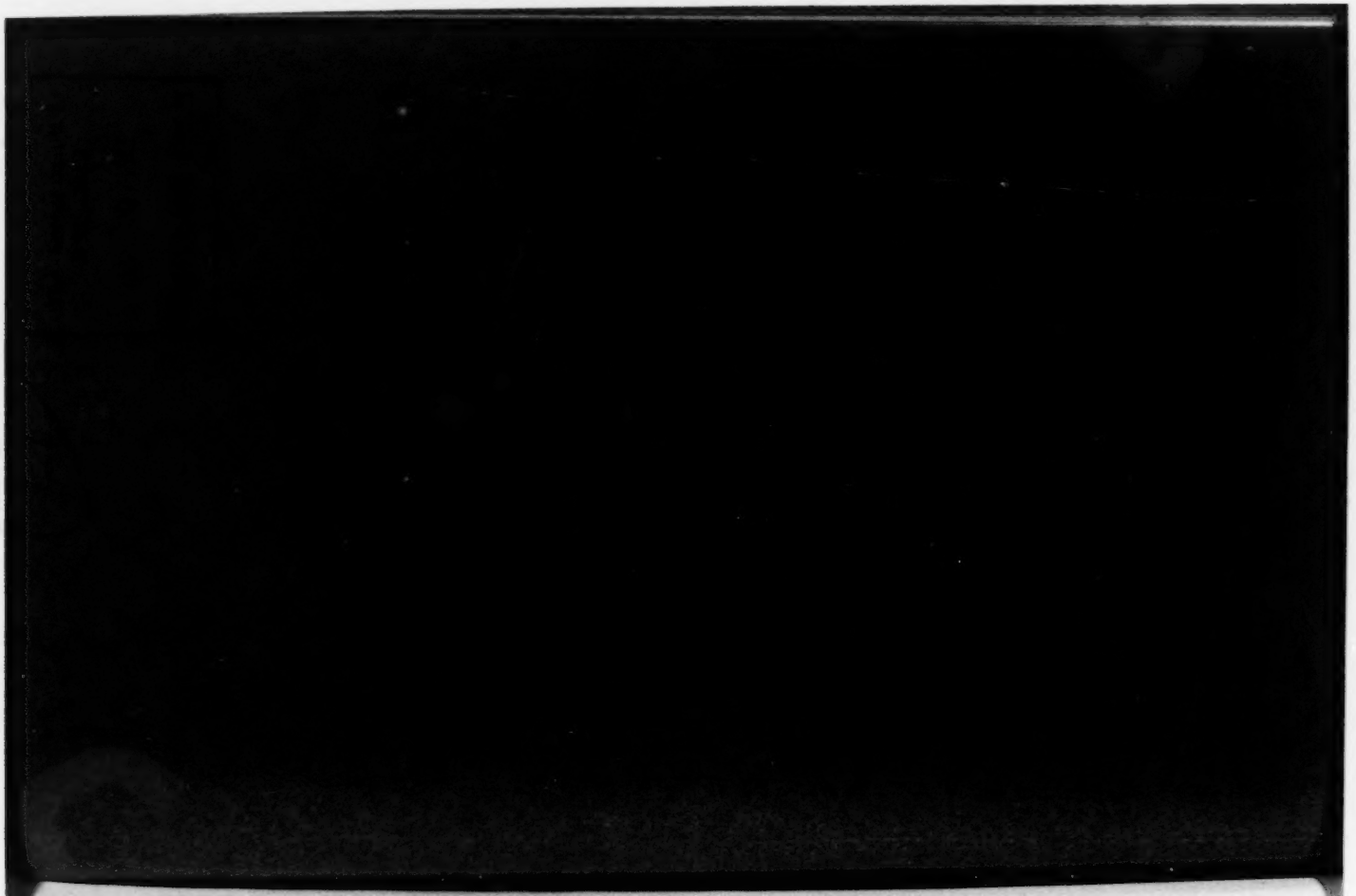

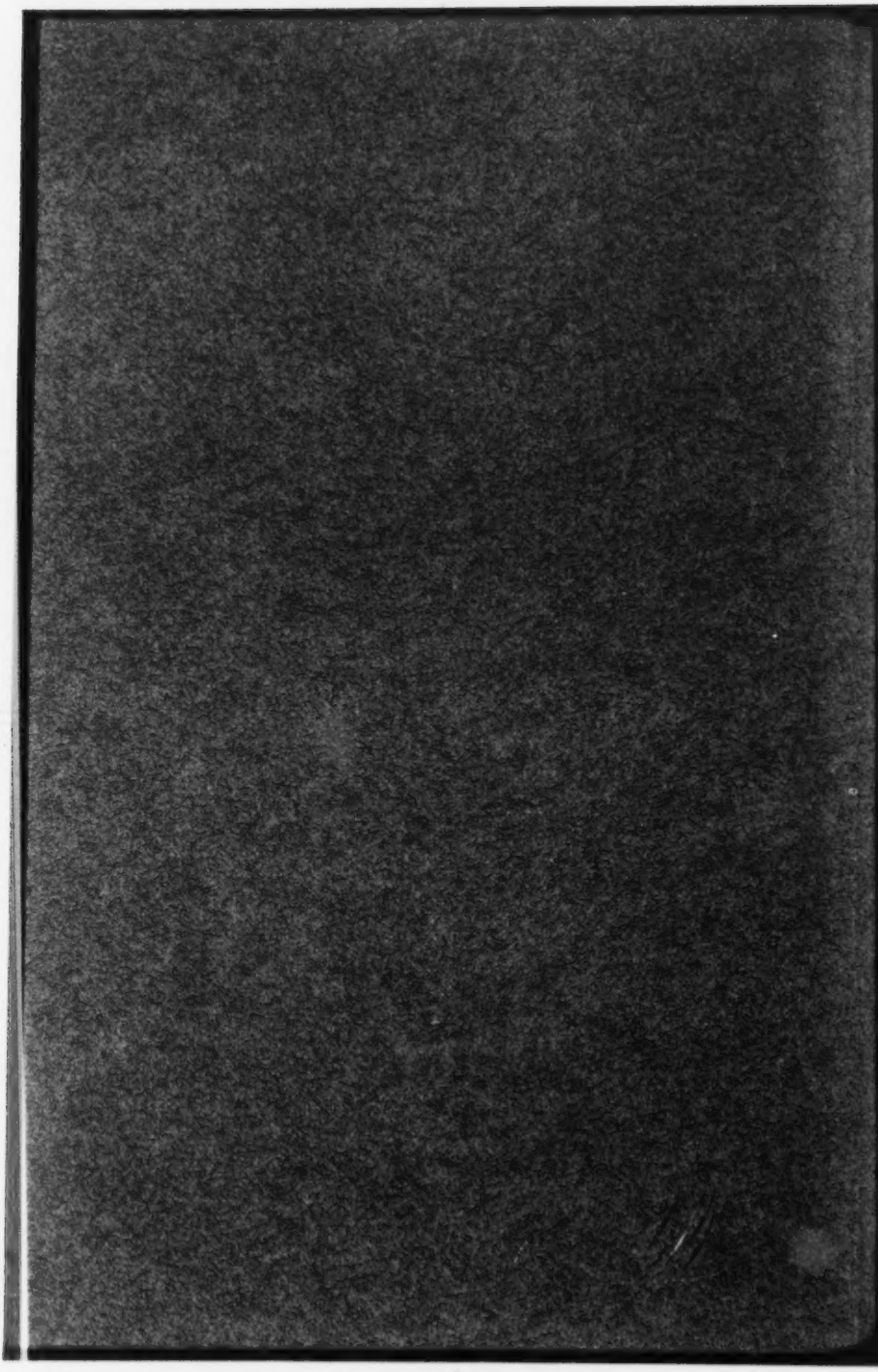

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1052

REED & PRINCE MANUFACTURING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 2070–2099) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1999–2046) are reported in 12 N. L. R. B. 944.

JURISDICTION

The decree of the court below (R. 2099–2101) was entered on April 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon findings that petitioner discriminatorily refused to reinstate certain employees in violation of the Act, the Board had power to require the reinstatement of such employees although they participated in a strike which was illegal under special doctrines of state law and committed minor misconduct on the picket line.

2. Whether the Board's decision and order abridged petitioner's right of freedom of speech, in violation of the First Amendment.

3. Whether petitioner was absolved of all obligation to bargain collectively pursuant to Section 8 (5) of the Act by reason of the fact that the Union, although representing a majority of the employees in an appropriate unit, sought a contractual provision granting it representation of its members only, where the parties at all times were in agreement that the provisions of the contract would in fact be extended to all employees in the unit and where petitioner's refusal to bargain was not based upon the "members only" clause.

4. Whether it was within the Board's power to remedy petitioner's refusal to bargain with a labor organization representing a majority of its employees by directing petitioner to bargain, upon request, with that organization, or whether such

an order was precluded by possible dissipation of the organization's majority representation, where the Board found that such dissipation, if it occurred, was attributable to petitioner's unfair labor practices.

5. Whether the Board, in the circumstances of this case, could properly require petitioner to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights" guaranteed in Section 7 of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition (pp. 20–24).

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusion of law, and order (R. 1999–2046). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

By March 19, 1937, more than 700 of petitioner's 782 employees in an appropriate unit had joined the Steel Workers Organizing Committee, herein referred to as the Union (R. 2003–2005; 102–105, 117–118, 664–665, 1779, 1781). Petitioner then

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

entered into a preliminary agreement with the Union; by its terms the contract was limited in application to the members of that organization, but petitioner applied the provisions of the contract to all of its employees (R. 2005–2006, 2034; 1772–1773). In further conferences held prior to May 19, 1937, with a view to negotiating a final contract, the parties reached a tentative agreement concerning wages, hours, and vacations (R. 2006–2009; 113–114, 133–148, 1056–1081, 1774–1778). With reference to union recognition, it was agreed that, pursuant to the Union's request, the contract would in terms recognize the Union as the representative of its members, but that petitioner would notify all employees that any contractual provisions agreed to between the petitioner and the Union would apply to all of them (R. 2033–2034; 343–345, 353, 1059, 1132, 1362, 1774).

On May 25 the Union called a strike because of dilatory tactics on the part of petitioner (R. 2009; 148–150, 236). During the strike petitioner submitted to the Union and publicized a proposed agreement containing clauses which petitioner knew were unacceptable to the Union, including a provision binding the Union never to seek either a closed shop or the check-off of dues "at any time in the future" (R. 2010–2011, 141–143, 1071, 339, 597–598, 1077–1078, 1776–1778, 1793–1800, 1809–1812). Petitioner likewise engaged in a vigorous compaign designed to destroy the employees' allegiance to the Union and to compel acceptance,

through means other than collective bargaining, of the form of agreement proposed by petitioner (R. 2011–2033). Petitioner's tactics included (a) the rebuff, after June 5, of all efforts by the Union to resume negotiations; and (b) various communications directed to the employees, castigating the Union and its leaders in abusive and insulting terms, distorting the Union's demands so as to discredit its motives and impugn its Americanism, making thinly veiled threats that acceptance of petitioner's form of contract was an essential prerequisite to reinstatement, and charging that the Union was ignoring the wishes of a majority of its members and seeking instead to advance its own interests at the employees' expense (R. 2011–2035, 472–481, 1802–1829, 511–512, 1921–1922, 153–155, 1387–1389, 650, 1839–1843, 157–159, 1094–1095, 1117, 1250–1251, 1328–1329).

Petitioner's campaign brought results: a "back-to-work" movement of familiar pattern gained momentum and by July 12, 411 of the 782 employees had signed petitions expressing their desire to abandon the strike and to accept the contract which petitioner had unsuccessfully and in bad faith proposed to the Union (R. 2016–2022; 671–674, 692–693, 696–699, 880–887, 892, 907, 913, 934, 990–991, 1436, 1464–1466, 1469). On July 13 the signatures of these 411 employees were attached to a contract which was practically identical in its substantive terms with the contract espoused by petitioner; subsequently the signatures of other employees

were added (R. 2020–2021; 705–707, 802–803, 1793–1800, 1830–1838). The strike was broken. On July 14 petitioner reopened its plant, and on the afternoon of the next day the Union terminated the strike (R. 2036–2037; 1300–1301, 1366–1367).

Petitioner reinstated all strikers who applied with the exception of four, three of whom were union officers and the fourth the sister of an officer. These employees, along with a number of others, picketed petitioner's plant on the morning of July 15. Some name calling and minor disorders occurred, the four employees were selected for arrest, they were charged with disorderly conduct, and, after prosecution conducted by petitioner's attorney before the local police court, the complaints in their cases were placed "on file" (R. 2036–2037; 245, 247–248, 267, 269–270, 302–305, 403–405, 1219–1221, 1300–1301, 1866–1868). Upon the basis of a stipulation of the parties (R. 801) that this meant, under local practice, "that at any time the complaint could be taken out of the file and the man found either guilty or not guilty," the Board found that the four employees were neither convicted nor acquitted (R. 2037).[2] The picketing in which the four employees were engaged at the time of their arrest violated an injunction issued by a state court on July 12 which enjoined all strike ac-

[2] As the court below pointed out (R. 2091, note), portions of the record other than the stipulation indicate that the result of the trial was equivalent to a suspended sentence (see R. 1864–1865).

tivity on the ground that the strike was illegal under Massachusetts law because one of its objectives was to obtain a compulsory arbitration clause (R. 2036–2037; 1220–1221, 1860–1864). Many of the employees whom petitioner reinstated had also engaged, along with the four arrested employees, in the picketing and the minor disorders which occurred on July 15 (R. 2037, 2038–2039; 245–246, 268–269, 280–282, 288, 303–304, 403–404, 1043–1050, 1221).

Upon the foregoing evidentiary findings, the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thus violating Section 8 (1) of the Act (R. 2011, 2016, 2022, 2035); had discriminatorily refused to reinstate the four employees in violation of Section 8 (1) and (3) of the Act (R. 2039); and had, on June 5, 1937, and at all times thereafter, refused to bargain collectively with the Union, in violation of Section 8 (1) and (5) of the Act, thereby prolonging the strike (R. 2035). The Board found further that the contracts entered into with the individual employees were void; that any defections from the Union were the result of petitioner's unfair labor practices; and that, even if it be assumed that petitioner's refusal to reinstate the four employees did not constitute an unfair labor practice, their reinstatement was necessary to effectuate the policies of the Act (R. 2005, 2019, 2021, 2041, 2042–2043).

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The Board's order required petitioner (1) to cease and desist from its unfair labor practices, from giving effect to the illegal contracts, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act; (2) upon request, to bargain collectively with the Union as the exclusive representative of petitioner's employees; (3) to offer reinstatement with back pay to the four employees discriminated against; (4) to notify the employees that the contracts were illegal; and (5) to post notices (R. 2044–2046).

Thereafter, the Board filed in the court below a petition for enforcement of its order (R. 1–5). On April 2, 1941, the court handed down its opinion and entered its decree enforcing the Board's order in full, except for minor modifications not here material (R. 2070–2101).[3]

ARGUMENT

1. Petitioner contends (Pet. 7–8, 9, 10–11, 12–14) that it was beyond the Board's power to re-

[3] The court modified the form of notices so as to conform with the Board's present practice, approved in *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941; set aside the "work relief" provision held invalid in *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7; and modified the provision requiring petitioner to notify the employees that the contracts were invalid so as to make that provision conform with the decisions of this Court in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, and *American Mfg. Co.* v. *National Labor Relations Board*, 309 U. S. 629 (R. 2090, 2092–2093, 2098, 2100–2101).

quire the reinstatement of the four employees (*supra,* pp. 6–7) who engaged in a tortious strike and were charged with and tried for disorderly conduct.[4] The Board's conclusion that these offenses were not the ground upon which petitioner eliminated the four employees is supported by the fact that petitioner reinstated a number of other employees who were guilty, equally with the four, of every offense upon which petitioner relies (*supra,* p. 7). "* * * the evidence does not show that [petitioner] had any rule or policy against the employment of such persons or that the refusal to reinstate * * * was based upon [their] conviction or indictment." *Eagle-Picher Mining & Smelting Co.* v. *National Labor Relations Board,* decided May 21, 1941 (C. C. A. 8).

Petitioner asserts that the decision of this Court in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U. S. 240, bars reinstatement of the employees in question. But neither of the two bases of decision in the *Fansteel* case—aggravated criminal conduct and a discharge for that reason—is present here. The quantitative and qualitative differences between the employee conduct in that case and the conduct involved here is apparent. The Circuit Courts of Appeals have uniformly held that the *Fansteel* decision does not require a denial of the normal reinstatement rem-

[4] The offense consisted of calling employees who returned to work "scabs" and "rats" (R. 2037; 1040–1041, 1043–1046, 1050).

edy to employees who engage in the types of minor misconduct—such as picket-line bickering and name calling—which are the usual unfortunate accompaniment of labor disputes. *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 67–68 (C. C. A. 2), modified and affirmed, 309 U. S. 629; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 479–480 (C. C. A. 3), certiorari denied on this point, 309 U. S. 684; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. (2d) 849, 855–856 (C. C. A. 7), certiorari denied, No. 615, this Term. See also Note, *Employee Misconduct Under the Wagner Act: Developments Since the Fansteel Case*, 39 Col. L. Rev. 1369. And the illegality of the strike under state law because the Union sought, *inter alia*, an arbitration clause (see R. 2086–2087), cannot serve to render the reinstatement remedy inappropriate to effectuate the policies of the National Labor Relations Act. Since petitioner readily took back all of the strikers except the four here involved, it must have been plain to the employees that the exercise of rights guaranteed by the Act, and not participation in an illegal strike, constituted the ground for the discrimination. The reinstatement remedy is plainly appropriate to dissipate these coercive effects. Cf. *Phelps Dodge*

Corp. v. *National Labor Relations Board,* Nos. 387, 641, this Term, decided April 28, 1941.

2. Petitioner contends (Pet. 9, 10, 11, 12, 15) that the Board's findings and order infringe petitioner's right of freedom of speech insofar as they treat the communications which petitioner addressed to its employees during the strike (*supra,* p. 5) as violations of the Act. But, as the court below held (R. 2092, 2095, 2097), the Board's ultimate finding that petitioner violated Section 8 (1), and the order based thereon, are fully supported entirely apart from the communications.[5] The Board's order contains no provision comparable to that held invalid in *National Labor Relations Board* v. *Ford Motor Co.,* 114 F. (2d) 905 (C. C. A. 6), certiorari denied, No. 661, this Term, i. e., a provision requiring the employer to cease and desist from distributing to its employees pamphlets disparaging labor organizations. Furthermore, it appears from subsequent decisions of the Sixth Circuit[6] that its decision in the *Ford*

[5] Contrary to petitioner's assertion (Pet. 15) that "the Court below held that the Board erred in finding that the Company's communications with its employees constituted a violation of Section 8 (1) of the Act," the court expressly stated that it did not find it necessary to pass on the point (R. 2095).

[6] See *National Labor Relations Board* v. *P. Lorillard Company,* decided February 14, 1941; *National Labor Relations Board* v. *Dow Chemical Company,* 117 F. (2d) 455, 456–457; *Atlas Underwear Co.* v. *National Labor Relations Board,* 116 F. (2d) 1020, 1023. See also *Midland Steel Products Co.* v. *National Labor Relations Board,* 113 F. (2d) 800, 804, decided prior to the *Ford* case.

case rested upon the court's determination that the literature which the employer distributed was not in fact coercive. That decision turned, therefore, on its own particular facts and is not in conflict with the decision below, as petitioner asserts (Pet. 15). The only question here is whether petitioner's abusive propaganda did in fact coerce and intimidate the employees in the circumstances of this case; on that question, the conclusion reached by the Board is plainly correct.

3. Petitioner contends (Pet. 9, 10, 11, 16–17) that it could not have refused to bargain collectively within the meaning of Section 8 (5) because the Union, although designated as their representative by a large majority of the employees in an appropriate unit, did not seek to bargain on behalf of all the employees in the unit but only on behalf of its members. The court below termed this contention a "technical point raised by [petitioner] as an afterthought to excuse its refusal to bargain with the representatives of its employees" (R. 2088). The Board's unchallenged findings, supported by substantial evidence (*supra,* p. 4), are to the effect that, prior to the refusals to bargain, petitioner and the Union had agreed that, although the recognition clause in any agreement reached would be a "members only" clause, petitioner would extend the provisions of the contract to all employees. And petitioner in fact extended to all

employees the benefits of the preliminary contract. Thus the Union was actually bargaining on behalf of all the employees in the unit (see R. 2088). Moreover, in rejecting the Union's requests to resume negotiations, petitioner did not place its refusal on the ground that the Union was not bargaining for the whole unit; on the contrary, the parties apparently at all times remained in agreement that the contract should contain a "members only" clause, and that its terms should in fact apply to all employees in the unit. Finally, even if the question which petitioner urges could be raised on this record, the question itself is plainly of extremely rare occurrence in the administration of the Act, and may not be termed one of general importance.

4. Petitioner contends (Pet. 10, 12, 17–18) that the order requiring it, upon request, to bargain collectively with the Union should not have been enforced without a redetermination of majority representation by an election. But the Board found, on ample evidence, that the defections from the Union inferable from employee signatures to the "back-to-work" petitions and the individual contracts (*supra*, p. 5) were the direct result of petitioner's illegal conduct during the strike; hence the asserted defections were ineffective to destroy the Union's status as the freely chosen majority representative. *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318, 340;

International Association of Machinists v. *National Labor Relations Board*, 311 U. S. 72, 82.[7]

5. Petitioner contends (Pet. 9, 10, 12, 18–19) that the court's enforcement of the Board's general cease and desist order (R. 2045, 2100) is contrary to the principles laid down in *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941. But the present case, as the court below held (R. 2096–2097), is manifestly one in which the general cease and desist order is valid because the employer's unfair labor practices were not "isolated acts in violation of the right of self-organization" but, on the contrary, constituted "persistent attempts by varying methods to interfere with the right of self-organi-

[7] The decisions in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350 and *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, upon which petitioner relies (Pet. 18), are plainly inapposite. In the *National Licorice* case this Court expressly noted that the propriety of the Circuit Court of Appeals' modification of the bargaining order was not before it for decision (309 U. S. at 359). In the *Fansteel* case valid discharges had changed the personnel in the appropriate unit to such an extent that it was apparent that the loss of majority might be attributable to reasons other than the unfair labor practices (306 U. S. at 261–262). The decision in *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8), upon which petitioner also relies (Pet. 18), has been overruled by the later decision of this Court in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 74. Moreover, it was of doubtful authority even prior to the *Machinists* decision in view of the later decision of the Eighth Circuit in *Bussman Manufacturing Co.* v. *National Labor Relations Board*, 111 F. (2d) 783.

zation in circumstances from which the Board or the court below found or could have found the threat of continuing and varying efforts to attain the same end in the future." *National Labor Relations Board* v. *Express Publishing Co., supra.*[8]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1941.

[8] Compare *Oughton et al.* v. *National Labor Relations Board*, decided April 4, 1941, opinion on settlement of decree (C. C. A. 3); *American Enka Corp.* v. *National Labor Relations Board*, decided April 7, 1941 (C. C. A. 4); *Bethlehem Steel Company* v. *National Labor Relations Board*, decided May 12, 1941 (App. D. C.); cf. *Pacific Gas & Electric Co.* v. *National Labor Relations Board*, decided March 31, 1941 (C. C. A. 9).

U. S. GOVERNMENT PRINTING OFFICE: 1941